

programming; and (3) vertical integration gave cable operators a financial incentive to favor their affiliated programmers over local broadcasters.<sup>115</sup> Evidence that local broadcasters' advertising revenues and ability to obtain financing declined when their audiences shrank due to the denial of effective cable carriage supported Congress' conclusions concerning the harm broadcasters were likely to suffer without must carry.<sup>116</sup>

In finding that the burden of must carry rules on cable systems was not significant, the Court relied on the fact that the number of broadcast stations added to cable systems as a result of must carry (*i.e.* excluding stations that were carried voluntarily even without the rules) constituted only 1.2 percent of total cable channel capacity nationally.<sup>117</sup> The Court also noted that few cable systems had had to drop any programming as a result of must carry, and that after the enactment of must carry cable operators nationwide still carried 99.8 percent of the programming they had carried before must carry.<sup>118</sup>

With the Turner Court's holding behind it, the Commission's task now is to implement the must carry provisions of the Communications Act in the DTV environment by translating the terms of carriage in the analog environment to accommodate the technical characteristics of DTV, creating a reasonable schedule for DTV carriage, and defining cable capacity to ensure that the must carry burdens on cable systems remain within the parameters established by Congress. The Commission should not, indeed it lacks the authority to, second guess the judgment of Congress and the Supreme Court by developing a new record to support

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<sup>114</sup> *Id.* at 214-15.

<sup>115</sup> *Id.* at 197-208.

<sup>116</sup> *Id.* at 208-10.

<sup>117</sup> *Id.* at 214.

<sup>118</sup> *Id.*

the constitutionality of implementing the Communications Act's must carry provisions in the DTV environment.<sup>119</sup> Instead, the Commission should develop a record of relevant information that will enable it to make a reasonable decision regarding how best to implement the statutory provisions.<sup>120</sup>

**b) The facts justify implementing DTV must carry**

Although the Commission need not develop a record to justify the implementation of DTV must carry rules, it should take care that the implementation strategy it crafts is suited to current cable and broadcast operations. The factual changes since the Congressional must carry record was compiled should reassure the Commission that the anti-competitive incentives cable systems had to refuse to carry analog signals remain strong – indeed are even stronger – when it comes to DTV signals. Furthermore, the conclusions Congress reached about the burdens on cable and the alternatives to must carry remain valid in the DTV environment.

Cable operators have increased their control over broadcast television viewers since 1992 and now control access to nearly 70% of U.S. households.<sup>121</sup> Cable operators have as much power and incentive to favor affiliated cable programming and other services over DTV signals as they do over NTSC signals. Cable's market power has not diminished appreciably

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<sup>119</sup> See *Jenner & Block Appendix to NAB Comments*.

<sup>120</sup> See, e.g., *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 241 (D.C. Cir. 1997) (the agency's obligation is to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts and the choice made") (quoting *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523, 535 (8th Cir. 1998) (in reviewing agency action, a court questions "not whether there might have been a better way for the agency to resolve the conflicting issues with which it was faced, but whether the agency's choice is a reasonable one.").

<sup>121</sup> See *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report*, 13 FCC Rcd 1034, 1049-1050 (1998) ("Fourth Annual Video Competition Report").

since 1992 (notwithstanding additional competition from direct broadcast satellite)<sup>122</sup> and cable operators continue to be vertically and horizontally integrated.<sup>123</sup> Whatever incentive cable operators might have to exclude, degrade, or otherwise discriminate against analog broadcast signals, that incentive is much greater when it comes to digital broadcast signals. Such signals have the capability of competing with cable on many new technical fronts. They may be technically superior to the cable operator's owned or affiliated programming. They may transmit interactive program guides that compete with guides that cable offers. They may provide "multichannel" programming or data supplements to HDTV free of charge. Finally, they may occupy channel space that cable would prefer to use for more remunerative interactive services like voice telephony.

Moreover, the vulnerability of the DTV broadcast service to such anti-competitive practices is greater than that of the NTSC service. Consumers accustomed to receiving analog television signals over cable who find themselves unable to receive digital signals will be unlikely to access such signals over-the-air. These consumers do not maintain outdoor antennas. The *Notice* asks whether such consumers can be expected to install such antennas and resort to A/B input selector switches to change their viewing habits. The answer to this can be found in the 1992 *Cable Act* deliberations, in which Congress found that input selectors were not adequate substitutes for carriage.<sup>124</sup> The *Notice* also questions whether consumers might find it easier to

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<sup>122</sup> See *id.* at 1048-1052.

<sup>123</sup> See *id.* at 1107-1127.

<sup>124</sup> See 1992 *Cable Act Senate Report* at 45, reprinted in 1992 U.S.C.C.A.N. at 1178 ("The Committee received considerable evidence that once individuals subscribe to cable it is rare for them ever to switch to receive an over-the-air signal. . . . Among other problems, 98 percent of cable homes do not have roof top antennas connected to their television sets, and those antennas that remain are often in poor condition. . . . Zoning ordinances and restrictive covenants often prevent the installation of antennas."). The Supreme Court found that there was substantial evidence to support Congress' conclusion that the use of A/B switches was "not an enduring or feasible method of distribution and . . . not in the public interest."

use input selectors placed on remote control devices. It is our understanding that less than half the DTV sets produced will have input selectors on the remote control devices. Moreover, switching to another input increasingly will deprive consumers of functions they may come to expect from their set-top boxes. In switching from cable to over-the-air, for example, viewers may lose their program guide or access to a modem that depends on a connection to the set-top box. Where the structure of viewing is dependent on a cable set-top box or other cable equipment, it is unreasonable to expect the consumer to radically change that structure in order to access local broadcast television stations.

Just as Congress found that broadcasters denied carriage would suffer financial harm in the analog environment, so broadcasters will suffer additionally in the DTV environment. They will probably not be able to recoup their investments in digital facilities, will not progress through the transition quickly so as to reduce operational costs by quitting one channel, and may have to pay fees to operate a digital channel that viewers cannot access if the transition deadlines are not met.

Finally, as to the burden of DTV must carry requirements during the transition, we note that cable capacity will be expanding rapidly over the next few years as DTV signals come on line. Cable systems in the larger markets, where any cable carriage obligation is likely to be most immediately and strongly felt (because more DTV stations are going on the air earlier) generally are upgrading their systems to 550 or 750 MHz. Many of these systems are also adding digital capacity, which means that they will be able to carry at least two DTV signals in each 6 MHz channel. That means that a 750 MHz system with some digital channels would

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*Turner II*, 520 U.S. at 219-21. It is important to note that even if there had been a reasonable A/B switch solution, the Turner Court probably would have upheld the must carry provisions. Content neutral regulations are not invalid simply because there is some imaginable alternative that might be less

only have to devote 12 MHz to carrying four DTV signals (which is a likely number in the early years of the transition). The largest cable systems, which together serve most cable subscribers, are at the forefront of these capacity increases. While it is clear that not all cable systems, even systems in large markets, are upgrading at the same pace, cable's general capacity trends should be taken into account when considering reasonable DTV must carry rules.

The following summarizes some of the cable system upgrades that can be expected over the next few years. Section 2 then presents a must carry proposal that is tailored to capacity increases in general.

- Time Warner Cable states that 70% of its systems will be upgraded to 750 MHz by the end of 1998. It is setting aside up to 100 MHz of increased system capacity for digital broadcast and cable applications.<sup>125</sup>
- TCI states that at the end of 1997, almost 60% of its systems ranged between 450 MHz and 750 MHz. Most major metropolitan systems will be upgraded to 750 MHz in the near future. 20 million homes had access to digital-equipped cable plants at the end of 1997. TCI's digital cable offerings provided up to an additional 36 video channels.<sup>126</sup> As of the spring of 1998, TCI had launched digital cable services in more than 85 markets.<sup>127</sup> One million digital subscribers are expected by the end of 1998.<sup>128</sup> TCI is adding 3,000-4,000 digital service subscribers daily and hopes to have 100% penetration of digital services within 3-4 years.<sup>129</sup>
- Comcast expects that 80% of its plant will be upgraded to 750 MHz by the end of 1998. Comcast's digital enhancements will include the provision of

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burdensome on speech. *See id.* at 217-18.

<sup>125</sup> *See* 1997 Time Warner Annual Report; *The Transition to High Definition Television: Hearing Before the Senate Comm. on Commerce, Science and Transportation Committee*, 105<sup>th</sup> Cong. (July 8, 1998) (Testimony of Joseph J. Collins).

<sup>126</sup> *See* 1997 Annual Report of TCI Communications Inc.

<sup>127</sup> *See* "TCI's Digital March Presses On," *Media Daily*, No. 5, Vol. 4 (Mar. 10, 1998).

<sup>128</sup> *See* *Cable Rate Increases: Hearing Before the Senate Comm. On Commerce, Science & Transportation*, 105<sup>th</sup> Cong. (July 28, 1998) (Testimony of Leo J. Hindery).

<sup>129</sup> *See* Merrill Lynch Capital Markets, "Cable Television Industry Report" (May 11, 1998).

150 channels. In 1997, 80% of homes served had access to 80 or more analog channels.<sup>130</sup>

- Cox expects that 70% of its plant upgrade will be completed by the end of 1998.<sup>131</sup>
- It is expected that US West Media will have upgraded 70% of its systems to above 550 MHz by the end of 1998.<sup>132</sup>

## 2. A Realistic And Reasonable DTV Must Carry Proposal

During the transition to DTV within a given market (that is, until there is 85% penetration of DTV signals within that market, as defined by the *1997 Budget Act*), cable systems should be required to carry the analog signals and, generally, the digital signals of local broadcast stations.<sup>133</sup> However, there should be some flexibility and creativity in implementing the DTV signal carriage obligation in terms of timing to ensure that existing cable programming is seldom displaced and that cable systems generally can incorporate the carriage of DTV signals with their own capacity increases and/or digital upgrades. DTV signals will be coming on the air gradually over the next four years in most markets. At the same time, the cable systems of most

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<sup>130</sup> See 1997 Comcast Annual Report.

<sup>131</sup> See Cable Rate Increases: Hearing Before the Senate Comm. On Commerce, Science & Transportation, 105<sup>th</sup> Cong. (July 28, 1998) (Testimony of James O. Robbins).

<sup>132</sup> See Cable Television Industry Overview, [http://www.ncta.com/overview98\\_1.html](http://www.ncta.com/overview98_1.html) (April 1998).

<sup>133</sup> So long as a licensee's analog signal is eligible for carriage on a cable system, that licensee's digital signal should also be eligible for carriage on the same cable system, provided that the licensee can provide a digital signal to the cable headend. In the digital environment, the Commission need not adopt signal quality standards for the delivery of a digital signal to a cable headend, since the signal will either be perfect or nonexistent. The Notice, ¶ 69, asks how the Commission should understand the Section 614(b)(5) provision that "a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local television station which is carried on the cable system . . .". We believe that it is clear from the statutory language that what cable operators are not required to carry are duplicative signals from *different* stations. A single station's DTV and NTSC signals are not duplicative in this sense because the signals originate from the *same* station rather than from "another local television station". The policy justification for this understanding is strong. If cable systems were freed from carrying the analog signal of a given station, most of the viewers in the early years of the transition would be disenfranchised. By the same token, freedom from carrying the DTV signal would result in some of the adverse consequences discussed above.

subscribers will be rolling out their own digital services. These systems should have an obligation to include competing DTV offerings with their own digital services so that consumers have a full array of competitive services available to them. Although the statutory cap protects cable systems from having to devote more than one-third of their capacity to must carry commercial channels,<sup>134</sup> we recognize that additional measures may be needed during the transition to DTV to minimize disruption for cable viewers. As the *Notice* recognizes, broadcasters have long called for flexibility in the implementation of digital must carry.<sup>135</sup>

The following proposal illustrates one way to adapt the must carry principle to the circumstances of particular cable systems, while ensuring that consumers have access to DTV signals through their cable systems as quickly as possible. We hope that this proposal opens the dialog on how to arrive at the flexibility necessary to implement DTV must carry.

Cable systems should be required to add DTV signals as they increase capacity or offer cable digital services. Under this “capacity-based” proposal, cable systems would be obligated to carry DTV signals on capacity that was unused as of the date the *Notice* was released (July 10, 1998) or on capacity that was or will be added after July 10, 1998 (whether by additional bandwidth or newly converted digital channels). Cable systems generally would not have to delete existing cable programming to carry DTV signals. Instead, a cable system that intended to offer digital services in the spring of 1999, for example, would simply determine the number of DTV signals in its market and make provisions to carry them (*e.g.*, by carrying two DTV signals on a single analog cable channel or by otherwise allocating sufficient capacity for DTV). Cable systems that are increasing capacity, for example from 450 MHz to 750 MHz, will

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<sup>134</sup> 47 U.S.C. § 534(b)(1)(B).

<sup>135</sup> See *DTV Joint Broadcaster Comments VI* at 34-35.

be creating room for an additional 66 channels. These systems should not have any difficulty accommodating what typically will be 4-12 DTV signals gradually turning on in a given market over the next few years. In most cases, such systems are also creating digital capacity and, thus, could carry an additional 132 digital channels (since two DTV channels can fit into a single 6 MHz digital cable channel without any digital compression).<sup>136</sup> We recognize that many cable systems are adding capacity so as to be able to provide telephony and other interactive voice and data services, as well as broadband video. These plans are irrelevant to the obligation of cable systems to carry the DTV signals that will compete with the mainstay cable video business. A cable system should not be able to avoid rules designed to prevent the exercise of gatekeeping power simply because, in addition to exercising that power, it has chosen to enter into non-traditional cable services.

Of course, there are special situations for which the capacity-based proposal will have to be tailored. Each of these should be handled in a way that puts cable systems on notice that they will have and should plan for DTV must carry obligations at some point and gives the necessary assurance to nascent DTV stations and consumers that the DTV signals will eventually be carried on the local cable systems.

The first special case is the cable system that is already large. A minority of MSOs have already “topped out” some systems for the next five or so years. These systems, which should be defined as systems of a certain size (*e.g.*, 750 MHz), should not be able to avoid must carry obligations simply because they upgraded before July 10, 1998. The Commission should require such systems to carry eligible DTV signals on or before July 10, 1999 (and

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<sup>136</sup> This assumes the use of 256-QAM modulation. The *Notice*, ¶¶ 44-45, estimates that 750 MHz systems can provide approximately 120 analog 6 MHz channels, while a 450 MHz system can provide 54 channels.



thereafter, as signals come on the air). This way, these systems will have some time to prepare for their must carry obligations and the DTV signals coming on the air will have assurance of carriage by next summer.<sup>137</sup>

The second special case is the cable system (generally one in a smaller market or one owned by a smaller MSO) that does not increase capacity or offer any digital programming during the transition. Naturally, these systems cannot be identified now, although some MSOs have made it clear that they have no intention of upgrading or providing digital services for the next few years. Unless these systems fall under the “small system” exception of the must carry provisions of the Communications Act, they should become subject to the DTV must carry rules at some point. The Commission should address this situation in one of two ways. It should either adopt a date certain, such as 2003, by which all cable systems subject to the Act’s must carry provisions must carry DTV signals, or require systems to begin carrying each eligible DTV signal within 24 months of the time the signal goes on the air.

The third special case is the cable system that increases capacity or begins to offer digital services at a time when only a few DTV signals have come on the air. Under the Commission’s roll-out schedule for DTV, affiliates of the largest four networks must build out by November 1, 1999, with other stations following in 2002 and 2003.<sup>138</sup> The competitive position of the emerging networks’ affiliates and other smaller stations could be harmed if these stations are not carried by cable systems, but the affiliates of the larger networks are carried either under retransmission consent or must carry. Thus, it is imperative that capacity-based DTV must carry rules avoid locking out stations that come on the air later, perhaps years after a

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<sup>137</sup> This solution to the special case of large cable systems is similar to what the *Notice*, ¶ 44, offers as the System Upgrade Proposal.

<sup>138</sup> *DTV Fifth Report & Order*, 12 FCC Rcd at 12840-41.

cable system has made room for the first DTV signals in its digital programming roster. To prevent this result, the Commission should require that cable systems “reserve” channel capacity for the eligible DTV stations that come on the air later. This capacity would be “reserved” in name only; cable programming or other cable use of the channels should be permitted until the DTV signals are available.

The *Notice* asks whether and to what extent broadcasters should be required to bear the costs that cable could face in carrying DTV signals.<sup>139</sup> These costs could vary tremendously depending on the technical choices cable systems make,<sup>140</sup> their business choices,<sup>141</sup> and the extent to which the cable industry cooperates with equipment manufacturers in arriving at technical standards that facilitate the transmission of digital cable and broadcast signals.<sup>142</sup> These are factors over which broadcasters have absolutely no control and for which they should not be held financially responsible. One of the advantages of a capacity-based approach to DTV must carry is that it tends to coordinate cable’s obligations to carry DTV signals with cable’s roll-out of its own digital services. For the most part, cable systems will already be deploying digital set-top boxes and upgrading their plants to handle digital signals when they are required to carry DTV signals. The Commission’s rapid adoption of must carry

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<sup>139</sup> Notice, ¶ 93.

<sup>140</sup> For example, a cable system need not convert a DTV signal to analog in order to pass it through the cable system and need not remodulate the DTV signal to QAM.

<sup>141</sup> For example, a cable system is not required to block ancillary and supplementary services from the DTV signal just as it is not now required to strip certain material out of the analog signal’s VBI. To the extent that a cable system chooses to do either of these things, it should bear its own expenses. It would be fair, however, to require broadcasters to facilitate cable’s right to block material not entitled to cable carriage by identifying the data packets that are part of an ancillary and supplementary service.

<sup>142</sup> For example, cooperation by the cable system with the equipment manufacturing and broadcast industries in an open standard-setting process in arriving at a standard for “cable-ready” DTV receivers could drastically reduce the need for digital set-top boxes capable of processing DTV signals.

rules will put cable systems on notice that the set-top boxes they purchase should be capable of processing and/or passing through DTV signals.<sup>143</sup>

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<sup>143</sup> If the Commission enforces the July 2000 deadline for the commercial availability of navigation devices, cable systems will not necessarily be responsible for the digital set-top boxes that consumers use to access DTV signals through their cable service. Thus, the marketplace would solve the problem of who should pay for deploying DTV-capable set-top boxes.

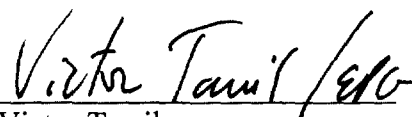
#### IV. CONCLUSION

MSTV urges the Commission to take the following actions to fulfill its statutory obligations to preserve the integrity and competitive viability of local television signals and to speed the public's transition to DTV:

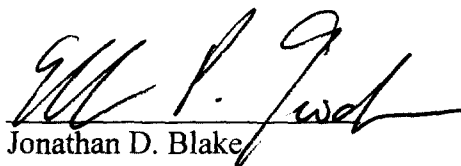
- Apply the network nonduplication and syndicated exclusivity rules in the digital arena so that a cable system honors the contractual terms between a station and its network or syndicator that provide for program exclusivity within a market;
- Require that DTV signals be carried on cable without material degradation (*i.e.*, cable systems should not be permitted to block or delete any of the bits comprising the free over-the-air broadcast material) so that viewers can access DTV signals in their original format, absent broadcaster consent;
- Require that cable systems ensure that the DTV channel may be found in the same way over cable that it can over-the-air (that is, using the PSIP protocol or another navigation tool that sets recognize when receiving signals over-the-air);
- Adopt a non-discrimination rule that would prevent cable systems from discriminating against competing or independent program guides carried on their systems or from favoring affiliated cable programming on their own program guides;
- Require carriage of all the free over-the-air broadcast video, accompanying audio, closed-captioning, and program-related material by simply defining the category of services not entitled to carriage (ancillary and supplementary services) to mean subscription services;
- Permit licensees to make separate must carry/retransmission consent elections and coordinate the DTV election period with the analog election period so as to begin in 2000 (or whenever a station goes on the air) and run until the end of 2003;
- Ensure carriage of DTV signals on a tier of service that is reasonably priced, either on the basic service tier or on a digital basic service tier;
- Require carriage of local DTV signals as cable systems increase capacity, with exceptions to ensure that larger cable systems, cable systems that upgrade before all local DTV signals are on the air and cable systems that delay in upgrading carry all eligible DTV signals at a reasonable time.

Respectfully submitted,

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October 13, 1998